

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

WAYNE POZZI AND KELLY POZZI  
Plaintiffs,

vs.

STATE AUTOMOBILE MUTUAL  
INSURANCE COMPANY, GSM INSURORS  
SERVICES OF SOUTH TEXAS, INC. and  
JAMES FLY,  
Defendants.

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6:16-cv-00061  
Civil Action Number

Jury

**PLAINTIFFS' MOTION TO REMAND FOR  
LACK OF JURISDICTION**

TO THE HONORABLE COURT:

NOW COME Plaintiffs Wayne Pozzi and Kelly Pozzi ("Plaintiffs") and file this motion to remand for Lack of Jurisdiction, and in support thereof respectfully show the Court as follows:

**I.  
BACKGROUND**

1. Plaintiffs file their motion to remand this case for lack of subject matter jurisdiction.

2. On August 8, 2016, Plaintiffs filed a Petition in the District Court of Victoria County, Texas, Cause No. 16-08-79946-D, alleging that State Automobile Mutual Insurance Company ("State Auto") breached its contractual obligations under a policy of commercial property insurance, and violated the Texas Insurance Code.

3. On September 16, 2016, State Auto filed its Notice of Removal to this Court [Dkt. 1] under 28 U.S.C. §1446(a), asserting jurisdiction pursuant to 28 U.S.C. §1332(a) (diversity

jurisdiction). In that regard, State Auto alleged that Plaintiffs are citizens of the State of Texas, while State Auto is a citizen of Ohio, and the amount in controversy exceeds \$75,000.

4. On February 6, 2017, Plaintiffs filed their Unopposed Motion for Leave to Add Additional Parties and to Amend Pleadings [Dkt. 13], seeking to add GSM Insurors Services of South Texas, Inc. and James Fly as parties defendant.

5. On February 9, 2017, the Court entered its Order [Dkt. 16] granting Plaintiffs' Unopposed Motion for Leave to Add Additional Parties [Dkt. 16].

6. On February 9, 2017, Plaintiffs filed their First Amended Complaint [Dkt. 17], asserting claims against GSM Insurors Services of South Texas, Inc. and James Fly, and reciting that GSM Insurors Services of South Texas, Inc. is a Texas corporation with its principal place of business in Rockport, Texas, and that James Fly is a Texas citizen residing in Victoria, Texas.

7. State Auto's Notice of Removal was based exclusively on §1332(a), diversity of citizenship between all plaintiffs and all defendants. The unopposed addition of Defendants GSM Insurors Services of South Texas, Inc. and James Fly results in lack of diversity jurisdiction because Plaintiffs, Defendants GSM Insurors Services of South Texas, Inc. and James Fly are all citizens of the State of Texas for diversity purposes. Accordingly, this Court no longer has subject matter jurisdiction over this case, and the case must be remanded to the District Court in Victoria County, Texas.

## **II.**

### **ARGUMENT AND AUTHORITIES**

8. Pursuant to 28 U.S.C. § 1441(a), any civil action brought in a State court of which the district courts for the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

9. A motion to remand a case on the basis of lack of subject matter jurisdiction may be made at any time before final judgment. 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded”). Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings. *See Ins. Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982).

10. Accordingly, while this case was properly removed to this Court at the time of removal, the subsequent unopposed addition of non-diverse defendants negated diversity jurisdiction, and this Court must remand this action to state court.

**III.**  
**PRAYER**

WHEREFORE, Plaintiffs request that this case be remanded to the District Court of Victoria County, Texas.

Respectfully submitted,

/s/ Marvin W. Jones

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**CERTIFICATE OF CONFERENCE**

This is to certify that the undersigned contacted opposing counsel by electronic mail on May 19, 2017 regarding the merits of this motion. Counsel for the State Automobile Mutual Insurance Company and counsel for GSM Insurors Services of South Texas, Inc. and James Fly are not opposed to the relief sought.

/s/ Marvin W. Jones

Marvin W. Jones

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of May, 2018, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Southern District of Texas, using the Court's electronic filing system. The electronic case filing system will send the "Notice of Electronic Filing" to the following attorneys who have consented in writing to accept this Notice as service of this document by electronic means. Further, a true and correct copy of the above and foregoing instrument was sent in the United States mail, certified mail, return receipt requested to those who have not consented to electronic means.

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